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Before The  
State Of Wisconsin  
DIVISION OF HEARINGS AND APPEALS

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In the Matter of Claims Against the Dealer Bond

of Boucher Chevrolet, Inc.

Case No. 98-H-1109

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FINAL DECISION

On October 30, 1998, Gerald Weber filed a claim against the motor vehicle dealer bond of Boucher Chevrolet, Inc. The claim was referred to the Division of Hearings and Appeals for hearing. The Administrative Law Judge gave the parties until February 5, 1999, to file any additional information they wished to have considered in issuing a preliminary determination in this matter. On January 26, 1999, Gerald Weber submitted a letter responding to a letter dated October 6, 1998, which the licensee had submitted to the Wisconsin Department of Transportation. The Administrative Law Judge issued a Preliminary Determination on March 11, 1999. No objections to the Preliminary Determination were received. Pursuant to sec. Trans 140.26(5)(d), Wis. Adm. Code, the Preliminary Determination is adopted as the final decision of the Department of Transportation.

Findings of Fact

1. Boucher Chevrolet, Inc., (Boucher or licensee) is a motor vehicle dealer licensed by the Wisconsin Department of Transportation pursuant to sec. 218.01, Stats. Boucher's dealership facilities are located at 1421 East Moreland Road, Waukesha, Wisconsin.

2. Boucher has had a bond in force from January 1, 1994, to the present date. (Bond #579262 from Capitol Indemnity Corporation, Madison, Wisconsin). The most recent bonding period commenced on January 1, 1998.

3. On June 5, 1998, Gerald Weber (Mr. Weber or claimant) purchased a 1992 Mitsubishi Montero, Vehicle Identification Number JA4GK51S7NJ009716, from the dealer. The vehicle was equipped with air conditioning.

4. The claimant purchased the subject vehicle AS/IS from the dealer. The dealer indicated no problem with the air conditioner on the Wisconsin Buyers Guide.

5. After he purchased the vehicle, Mr. Weber alleges that the air conditioning did not work properly. On August 4, 1998, Mr. Weber brought the vehicle back to the dealer for other repairs and to have the air conditioning checked. The technician who serviced the vehicle reported that the air conditioning was working properly and no repairs to the air conditioner were made.

6. On September 15, 1998, Mr. Weber brought the vehicle back to the dealer and reported that the air conditioner had stopped working. Boucher inspected the vehicle and found that the condenser and high-pressure line had failed. The dealer offered to make the necessary repairs to the air conditioner with a 15% "courtesy discount." Mr. Weber refused this offer and filed a consumer complaint with the Wisconsin Department of Transportation, Dealer Section (Dealer Section).

7. The Dealer Section conducted an investigation. Investigator Kevin Konopacki contacted the previous owner of the vehicle to inquire whether the air conditioning was working at the time he traded in the vehicle. The previous owner stated the air conditioning was working at that time. Investigator Konopacki informed Mr. Weber that there was a lack of evidence that the problem with the air conditioner was present at the time the vehicle was sold by the dealer to Mr. Weber and should have been disclosed by the dealer. Investigator Konopacki did not cite the dealer for any violation related to this transaction. Mr. Weber then filed a claim against the motor vehicle dealer bond of Boucher.

8. The claim was filed within three years of the ending date of the period the Capitol Indemnity Corporation bond was in effect and is; therefore, a timely claim.

9. Mr. Weber claims a loss of \$600.00, the estimated cost to repair the vehicle's air conditioner. This loss was not caused by an act of the dealer that would be grounds for the suspension or revocation of its motor vehicle dealer license. Accordingly, the claim is not allowable.

#### Discussion

The procedure for determining claims against dealer bonds is set forth at Chapter Trans 140, Subchapter II, Wis. Adm. Code. Sec. Trans 140.21(1), Wis. Adm. Code provides in relevant part:

A claim is an allowable claim if it satisfies each of the following requirements and is not excluded by sub. (2) or (3):

(a) The claim shall be for monetary damages in the amount of an actual loss suffered by the claimant.

(b) The claim arose during the period covered by the security.

(c) The claimant's loss shall be caused by an act of the licensee, or the claimant's agents or employees, which is grounds for suspension or revocation of any of the following:

1. A salesperson license or a motor vehicle dealer license, in the case of a secured salesperson or motor vehicle dealer, pursuant to s. 218.01 (3) (a) 1. to 14., 18. to 21., 25. or 27. to 31., Stats.

(d) The claim must be made within 3 years of the last day of the period covered by the security. The department shall not approve or accept any surety bond or letter of credit which provides for a lesser period of protection.

Accordingly, to allow Mr. Weber's claim, a finding must be made that Boucher violated one of the sections of sec. 218.01(3)(c), Stats., listed in sec. Trans 140.21(1)(c)1, Wis. Adm. Code. Mr. Weber's claim does not specify which provision he believes was violated; however, presumably, he is alleging that the licensee failed to disclose a material defect in violation of sec. Trans 139.04(4), Wis. Adm. Code, which would in turn be a violation of sec. 218.01(3)(a)4 and/or 14, Stats.

Section Trans 139.04(4), Wis. Adm. Code, provides:

**USED MOTOR VEHICLE GENERAL CONDITION DISCLOSURE.** Dealer and salespersons shall inform prospective retail purchasers of used motor vehicles in writing before purchase contract execution, in the manner and on the form prescribed in sub. (6). This disclosure shall include all significant existing mechanical, electrical and electronic defects and damage and evidence of repair to strut tower, trunk floor plan, frame or structural portion of unibody, including corrective welds. Disclosure of information shall be that which the licensee can find using reasonable care.

The facts in the record do not support such a determination. Mr. Weber claims that the air conditioner did not work properly the first time he used it after he purchased the vehicle. However, he did not take the vehicle to the dealer until almost two months after he purchased it. According to the dealer's repair order, Mr. Weber informed the service department that the air conditioning "is not blowing real cold." When Mr. Weber picked his vehicle up the air conditioner was working. Approximately two weeks later the air conditioner stopped working completely and now needs a \$600 repair.

There is no evidence that the air conditioning was defective at the time the claimant purchased the vehicle. However, even if one assumes that the air conditioning was defective, the disclosure requirements contained in sec. Trans 139.04(4), Wis. Adm. Code, apply only to material defects that a dealer can find using reasonable care. There is no evidence that even if the air conditioning was defective at the time of purchase, the defect could have been found using reasonable care. To the contrary, the previous owner of the vehicle told the Dealer Section Investigator that the air conditioning was working when he traded the vehicle in.

In his statement filed on January 26, 1999, Mr. Weber admits that he believes "Boucher Chevrolet tested the [air conditioning] system and it worked prior to [his] purchasing the truck." Mr. Weber does not state whether he personally tested the air conditioning prior to purchasing the vehicle. However, even if he did not and it is true that the air conditioning did not work the first time he used it, it is undisputed that the air conditioning was working after the vehicle was serviced on August 4, 1998. Therefore, at worst, the air conditioning was working intermittently. The problem which caused the air conditioner to stop working in September of 1998, the failure of the condenser and high-pressure line, is not the reason the air conditioning did not work properly in August.

In summary, Mr. Weber has presented no evidence that the air conditioner was defective at the time he purchased the vehicle. More importantly, even if one assumes the air conditioner was defective simply based on the fact that it stopped working so soon after Mr. Weber purchased the vehicle, there is no evidence that Boucher knew of the defect or could have discovered the defect using reasonable care prior to selling the vehicle to Mr. Weber. A dealer is not required to disclose a defect that it is not aware of or could not have discovered by an inspection using reasonable care. The record contains no evidence of a violation of any state statute or administrative rule by Boucher which caused Mr. Weber's loss.

### CONCLUSIONS OF LAW

1. Gerald Weber's claim arose on June 5, 1998, the date he purchased the subject vehicle from Boucher Chevrolet, Inc. The surety bond issued to Boucher Chevrolet, Inc., by Capitol Indemnity Corporation covers a one year period commencing on January 1, 1998. The claim arose during the period covered by the surety bond.

2. Mr. Weber filed a claim against the motor vehicle dealer bond of Boucher Chevrolet, Inc., on October 30, 1998. The bond claim was filed within three years of the last day of the period covered by the surety bond; therefore, pursuant to sec. Trans 140.21(1)(d), Wis. Adm. Code, the claim is timely.

3. Mr. Weber's loss was not caused by an act of Boucher Chevrolet, Inc., which would be grounds for suspension or revocation of its motor vehicle dealer license; therefore, pursuant to sec. Trans 140.21(1)(c), Wis. Adm. Code, the claim is not allowable.

4. The Division of Hearings and Appeals has authority to issue the following order.

### ORDER

The claim filed by Gerald Weber against the motor vehicle dealer bond of Boucher Chevrolet, Inc., is DENIED.

Dated at Madison, Wisconsin on April 15, 1999.

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MARK J. KAISER  
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